No. 13552

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAFO IVANCEVIC, Consul General of the Federal People's Republic of Yugoslavia,

Appellant,

vs.

ANDRIJA ARTUKOVIC,

Appellee,

JAMES J. BOYLE, United States Marshal,

Appellant,

vs.

ANDRIJA ARTUKOVIC,

Appellee.

APPELLANTS' OPENING BRIEF.

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Jurisdictional Statement.

This appeal is from an order of the United States District Court, Southern District of California granting a Writ of Habeas Corpus [R. p. 92] upon the petition of Appellee and for the release of Appellee upon bail pending appeal [R. p. 3]. Appellee was in the custody of the

United States Marshal, one of the Appellants herein, under a warrant of arrest issued by the United States Commissioner under a complaint in extradition filed by Rafo Ivancevic, as Consul-General of the Federal Peoples Republic of Yugoslavia, the other Appellant herein, seeking the return of Appellee to Yugoslavia for trial upon multiple murder charges.

Jurisdiction of the District Court is based upon Title 28, U. S. C. Sections 2241 *et seq.*

Jurisdiction of the Court of Appeals is based upon Title 28, U. S. C., Section 2253, as follows:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had."

That the Consul-General may properly prosecute the appeal on behalf of his government as the real party in interest is based upon Rule 17(a), F. R. C. P., and on the case of *Ornelas v. Ruiz,* 161 U. S. 502 [see R. p. 104].

Extradition was sought under the terms of a treaty between the United States and Serbia for the mutual extradition of fugitives from justice signed at Belgrade October 25, 1901; ratification advised by the Senate January 27, 1902; ratified by the President March 7, 1902; ratified by Serbia, March 17, 1902; proclaimed May 17, 1902 (32 Stats., part 2, 1890). The text of said treaty is appended hereto as Appendix "A."

Statement of Case.

On August 29, 1951, a complaint in extradition was filed with the Honorable Howard V. Calverley, United States Commissioner for the Southern District of California by Appellant, Rafo Ivancevic, as Consul-General of the Federal Peoples' Republic of Yugoslavia. This complaint, which was subsequently amended, originally charged the Appellee Artukovic with twenty-three murders within the country of Yugoslavia and asked for his extradition under the terms of a treaty of extradition made between the United States of America and the Kingdom of Serbia in 1902 and alleged to be in full force and effect between the United States of America and the Federal People's Republic of Yugoslavia.

Appellee was arrested and a subsequent application for release on bail was denied by the Honorable United States Commissioner.

A petition for a writ of habeas corpus was filed with the United States District Court for the Southern District of California on September 12, 1951 [R. p. 3]. This petition originally sought nothing more than the release of petitioner upon bail pending the extradition hearing. However, at the suggestion of the District Court, an amended petition was filed in which the effectiveness of the extradition treaty was questioned as well as the sufficiency of the complaint in extradition.

At the commencement of the hearing upon the petition for a writ of habeas corpus, a formal appearance was filed upon behalf of Rafo Ivancevic, as Consul-General of

the F. P. R. Y. [see R. p. 19] which was accepted by the Court [R. pp. 103-106].

A return to the Order to Show Cause on the petition for a writ was filed by the respondent, James J. Boyle, United States Marshal by the United States Attorney [R. p. 14].

During the course of hearings upon the petition and prior to the final decision of the Court, Appellee was released upon bail in the sum of $50,000 pending the final determination of the other issues presented [R. p. 289 *et seq.*].

Again, during the course of the hearings, an amended complaint in extradition was filed with the United States Commissioner, and a copy thereof presented to the District Court as Demanding Government's Exhibit H [R. p. 378]. Since this amended complaint charges Appellee with the murder of some 1277 persons (and in parallel counts with participation in such murders), repeating the list of names some three times in 24 similar counts and in a copy of the indictment or accusation filed in Yugoslavia and attached to the amended complaint, an order of this Honorable Court was obtained relieving Appellants from printing this material. The original exhibit is present in the Court's files.

During the course of the proceeding the position of the Consul-General of the Federal People's Republic of Yugoslavia was referred to by the Court and all parties as that of "the Demanding Government."

On behalf of the Demanding Government a certificate of the United States Secretary of State was filed as Exhibit DG.E [R. p. 362] stating that the provisions of the

treaty of extradition in question which entered in force between the United States of America and the Kingdom of Serbia on June 12, 1902, continued in force and were applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes, as constituted on December 1, 1938, and to the Kingdom of Yugoslavia, to which the name of the Kingdom was changed by a law of October 3, 1929; and further, that all of the provisions of said treaty continued in force and became applicable to the Federal People's Republic of Yugoslavia as proclaimed on November 29, 1945 and are presently in force between the United States of America and the Federal People's Republic of Yugoslavia.

A certificate of the Yugoslav Ambassador testifying to the present applicability of the treaty was also presented as Exhibit DG. F [R. p. 372].

During the course of argument and in memoranda filed with the District Court, counsel for all parties referred to various communications between diplomatic representatives of the United States of America and representatives of the Kingdom of the Serbs, Croats and Slovenes, the Kingdom of Yugoslavia, and the Federal People's Republic of Yugoslavia. All of these communications, official in nature, come within the rule of judicial notice. Several of them are set out as footnotes to the District Court's opinion [R. p. 35], and others will be referred to in the course of this argument.

It was contended by counsel for the Demanding Government that the treaty rights and obligations of the Kingdom of Serbia have continued uninterruptedly in force and effect and enure to, and are binding on the Federal People's Republic of Yugoslavia *for the reason*

that a duly established treaty survives and continues to be in force and effect notwithstanding any subsequent enlargement in the territory, or change in the form of the government of either of the contracting powers and enures to, and is binding on a successor state.

It was further contended by counsel for the Demanding Government that the question whether a treaty survives changed conditions is political in its nature, and that such a political decision as evidenced by the Exhibits referred to above (and by other official correspondence) when made by the Executive Branch of the Government will not be overruled by the courts.

On July 14, 1952, the Court rendered its opinion [see R. p. 35, *et seq*]. The opinion held that the Treaty of Extradition with Serbia did not survive the formation of the Kingdom of the Serbs, Croats and Slovenes in 1918.

On July 31, 1952, the Court entered its order granting the petition for a Writ of Habeas Corpus, releasing the Appellee and fixing bail in the amount of $5,000 pending appeal [R. p. 92].

Notice of Appeal was filed by the Appellant Ivancevic, as Consul-General on August 13, 1952 [R. p. 94]. On September 29, 1952, Notice of Appeal on behalf of the Respondent James J. Boyle, United States Marshal, was filed by the United States Attorney [R. p. 99].

Thereafter, counsel for Appellant Ivancevic was substituted for the United States Attorney as attorney for the United States Marshal [R. p. 399]. Both appeals were perfected by the filing of designations of record and statements of points on appeal, both in the District Court and Court of Appeals.

Forword.

The matters presented by this appeal are of grave international importance. Not only is the entire treaty structure between the United States of America and the Federal Peoples' Republic of Yugoslavia affected, but the entire treaty structure of the United States with other nations is involved.

The question presented is that of the survival of treaty rights and obligations through a change in the form of government or territory of either of the Contracting Powers. Since almost every country with which the United States has treaty relations has been affected by changes in form of government and in boundaries since the conclusion of the treaties, the importance is readily seen.

Furthermore, since the succession of treaties through changes in the outward or inward form of International Persons is a matter recognized and accepted in International Law, a change in this rule, as contemplated by the decision of the District Court, might lead to unpredictable complications and consequences.

Questions on Appeal.

Actually the only question is whether Extradition Treaty which entered into force on June 12, 1902 between the United States of America and the Kingdom of Serbia is still in force between the United States of America and the Federal People's Republic of Yugoslavia. In its opinion, the District Court held that the

creation of the Kingdom of the Serbs, Croats and Slovenes in 1918 terminated all treaty rights and obligations then existing between the Kingdom of Serbia and the United States.

Inherent in this question are two others, one purely of law, the second involving factual history relating to the *status* of Serbia through its transition into the Kingdom of the Serbs, Croats and Slovenes, the Kingdom of Yugoslavia, and the Federal People's Republic of Yugoslavia. These are as follows:

(a) Is the survival of treaty rights and obligations as affected by changes in the form of government or territory of the other contracting power, a political question to be decided by the Executive Branch of the United States Government, and is such a political decision of the Executive Branch controlling upon the courts?

(b) Did the Kingdom of Serbia retain its juridical entity in the formation in 1918 of the Kingdom of the Serbs, Croats and Slovenes, and/or did the Kingdom of the Serbs, Croats and Slovenes succeed the Kingdom of Serbia in such manner that treaties entered into by the Kingdom of Serbia survived and continued to be in force and effect with respect to the Kingdom of the Serbs, Croats and Slovenes?

SUMMARY OF ARGUMENT.

I.

The general rule of International Law is that treaty rights and obligations survive changes in territory and forms of government of either of the contracting powers.

(1) Territorial changes.

(2) Changes in form of government.

II.

The Kingdom of the Serbs, Croats and Slovenes was the successor to the Kingdom of Serbia, and as such the latter's treaty rights and obligations adhered to it.

(1) The formation of the Kingdom of the Serbs, Croats and Slovenes.

(2) Official interchange of correspondence between representatives of the Kingdom of Serbia, the United States of America and the Kingdom of the Serbs, Croats and Slovenes.

(3) Recapitulation of points indicating survival of juridical entity of Serbia.

III.

Questions of the survival in force and effect of treaties notwithstanding territorial and governmental changes, and the succession of states to treaty rights and obligations are political questions upon which the decision of the Executive Branch of the Government is controlling.

(1) The rule of Political Decision.

(2) Evidence of the Political Decision.

(3) Action taken pursuant to the Political Decision.

IV.

The question of Bail and Conclusion.

ARGUMENT.

I.

The General Rule of International Law Is That Treaty Rights and Obligations Survive Changes in Territory and Forms of Government of Either of the Contracting Powers.

The following authorities are cited in support of the contention by Appellants that treaty rights and obligations survive territorial changes of a state and changes in the form of government within a state.

1. Territorial changes:

"Mere territorial changes, whether by increase or by diminution, do not, so long as the identity of the state is preserved, affect the continuity of its existence or the obligations of its treaties."

1 *Moore, Digest of International Law* (1906), p. 248.

"It may be stated as a general principle that the territory of the annexed or incorporated state becomes impressed with the treaties of the acquiring state so far as locally applicable, to be determined in each instance by the character of the particular treaty and the nature of the union. The former Republic of Texas, upon its admission as a State into the Union on terms of equality with the other States, undoubtedly became bound and privileged by all the treaties of the United States of which it had become an integral part."

Crandall, Treaties: Their Making and Enforcement (2d Ed., 1916).[1]

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[1]Many other authorities on this point are set forth at length in the brief *amicus* filed on behalf of the United States Government. It would needlessly add to the work of the Court to repeat these citations here, but Appellants join in the views therein expressed and adopt such authorities as their own.

Indicative of the attitude taken toward an extension of territory by union are the views expressed concerning the formation of the Kingdom of Italy. This, we contend, is very similar to the situation presented by the union to Serbia of the other territories inhabited by Yugoslavs.

Lombardy, Tuscany, Emilia, Parma and the Kingdom of the two Sicilies united with Sardinia to form the Italian Kingdom between 1859 and 1861. The Italian Government took the position that only Sardinia, of all those states, had maintained its juridical entity and that the treaties of Sardinia alone survived the union, and were considered to have been extended to the whole territory. This was on the theory that the existing State of Sardinia, serving as a nucleus (*sic*—Serbia) had expanded into a larger State into which a number of others had been absorbed.

On this point, the Harvard Research into the Law of Treaties (A. J. I. L., Supp., Pt. III, Vol. 29 (1935), p. 1073) states:

> "The courts of both Italy and France held that the treaty of March 4, 1760, concluded between France and Sardinia, relative to the execution of judgments, survived the formation of the Kingdom of Italy and was applicable throughout the Kingdom of Italy and binding on both countries—this on the theory that the Italian Kingdom was merely an expansion or enlargement of the State of Sardinia. . . . For the French decisions, see, among others, the cases of *La Moderazione c. La Chambre d'Assurances* (Court of Paris, 1879), *Mantil c. Pompilis* Tribunal Cor. of the Seine, 1883, 10 *Journal du Droit International Prive,* 1883, p. 500), and *Vincent c. Bardini, Dalloz,* 1901, 2.2257 and the note

thereon by Pic. See also the decision of the Court of Montpellier of July 10, 1872, in the case of *Iconomidis v. Coude* (6 Journal du Droit International Prive, 1879, p. 69), where it was emphasized that additions to the territory of a State have no effect upon the State's treaty obligation. . . . For the Italian Jurisprudence, see, among others, the decision of the Italian Court of Cassation of December 3, 1927, in the case of *Gastaldi v. Lepage Hemery* (9 *Revista di Diritto Internazionals,* 3d. ser. 1930, p. 102), where the survival of the treaty of 1760 between France and Sardinia was affirmed, on the principle that the Italian State was merely an expansion of the Kingdom of Sardinia. See also the decisions of various Italian Courts cited or summarized in 5 *Journal du Droit International Privé* (1878), p. 244, and 6 *ibid.* (1879), p. 305 ff.

"It may be added that the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and the District of Gex,* recognized that the treaty of Turin of March 16, 1816, between Sardinia and Switzerland survived the transformations which resulted in the formation of the Italian Kingdom. Publications of the *P. C. I. J.,* Series A, No. 22, p. 18 and Series A, No. 24, p. 17.

"The conclusion deducible from the practice in the case of the formation of the Italian Kingdoms is that when a State enlarges its territorial domain by the annexation of other states, its treaties continue to bind it."

At the Paris Peace Conference in 1919, the Great Powers accorded to Serbia a position, juridically speaking, with respect to the Kingdom of the Serbs, Croats and Slovenes, parallel to that of Sardinia in the Kingdom

of Italy. Thus, in the first instance, delegates bearing the credentials of the Kingdom of the Serbs, Croats and Slovenes were received only as representatives of Serbia. Later during the conference they were recognized as representing the Kingdom of the Serbs, Croats and Slovenes as the state to which the international rights and obligations of the former Kingdom of Serbia enured.[2]

Attention must be drawn at this point to a statement in the memorandum opinion of the District Court which seems rather specious. In his attempt to differentiate the rule of political decision in the case of *Terlinden v. Ames,* 184 U. S. 270, 22 S. Ct. 484, 46 L. Ed. 534, the court calls attention to the fact that the treaty *there* involved provided that it would be applied "to any other state of the Germanic Confederation, which may hereafter declare its accession thereto." The Trial Judge stated [R. p. 55]:

> "No provision is found in the treaty with Serbia of 1902 as that which existed in the treaties under consideration in *Terlinden v. Ames,* extending the terms to additional territory. And *it must be assumed that had the parties intended that the extradition treaty with Serbia of 1902 should apply to persons residing in territories which might subsequently come under the jurisdiction or sovereignty of Serbia, that the parties would have specifically stated that in the treaty.* The omission cannot be supplied by either Executive or Judicial construction." (Emphasis added.)

Since it is the generally accepted rule that an increase or decrease of territory does not affect the continued

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[2]Temperley: A History of the Peace Conference of Paris, Vol. 5, p. 158.

existence of a treaty as long as the entity of the "international person" survives; or, juridical continuity is established between the personality of the old and new state, it would seem the more correct assumption that in the absence of a contrary provision, the parties intended that the accepted rule would apply and that the treaty would survive a change in territorial limits. The conclusion of the Trial Judge that the absence of a specific provision for continued validity prevents the survival of the treaty in the event of territorial or governmental change is not supported by any legal authority. On the contrary, it is a generally accepted rule that every juridical provision is to be interpreted in the sense of the general rule and not in that of an exception.

If the reasoning of the Trial Judge were accepted, then in the absence of a specific clause, no treaty right or obligation would survive the slightest change in the territorial boundaries of either of the contracting powers, and this would result in an absurdity, for treaties are made under the assumption of the state's stability and without regard to any possible changes in territory or form of government.

In any event, the reliance of the Court below on the provisions of the Prussian treaty referred to in *Terlinden v. Ames supra,* is misplaced. That was a treaty between the United States and one member of a group of sovereign and independent states joined together in a loose confederation. That such a treaty should specifically provide for the accession to it of other members of the confederation, does not support the contention that a treaty between two states loses its validity, in the absence

of specific provision in the event of territorial or governmental changes resulting from union or otherwise.

Accordingly, Appellants urge that treaty rights and obligations survive territorial and governmental changes where the juridical personality of the Contracting Power continues or is succeeded to.

2. Changes in Form of Government.

It is also the accepted rule that treaties survive changes in the form of government of one of the contracting Powers.

The point is perhaps academic here, as the only change in the form of government in Yugoslavia was upon the formation of the present Federal People's Republic in 1945. The Court made no point of this in its decision which dealt only with the survival of the treaty in 1919 through the formation of the Kingdom of the Serbs, Croats and Slovenes. The point is well supported in the texts set out at length in the *amicus* brief filed on behalf of the United States Government, and in the interests of brevity will not be repeated here.

On this point, however, appellants wish to cite the case of *The Sapphire,* 78 U. S. 164. The case involved a collision between the French transport Euryale and the Sapphire. A libel was filed in the name of Emperor Napoleon III, then Emperor of France, as owner. During the proceedings Napoleon was deposed. One of the issues was the possible abatement of the action. The Court stated [p. 168]:

> "The reigning sovereign represents the national sovereignty and that sovereignty is continuous and perpetual, residing in the proper successors of the

sovereign for the time being. . . . On his (Napoleon's) deposition, the sovereignty does not change, but merely the person or persons in whom it resides. . . . *A deed to or treaty with a sovereign as such enures to his successors in the government of the country.*"

Grotius, *The Rights of War and Peace* (Washington: M. Walter Dunn, 1901) pp. 120, 121 (Lib. II, cap. IX, Sec. VI), states:

"Nor does it make any difference in the argument, whatever the form of government may be, whether regal, aristocratical or democratical. The Roman people for instance was the same, whether under Kings, consuls or emperors. . . . It is evident that a state, which from a commonwealth has become a regal government, is answerable for the debts incurred before that change."

Also at pp. 184, 185 (Lib. II, cap. XVI, Sec. XVI):

"The nature of personal and real treaties . . . may properly be examined in this place. Indeed in all transactions with a free people, the engagements entered into with them are of a real nature; because the subject of them is a permanent thing. So permanent, that, although a republican be changed into a regal government, a treaty will remain in force. . . . But if a treaty be made with a King . . . it does not consequently follow that it is to be considered only as a personal and not a real treaty. For the name of a person may be inserted in a treaty . . . to point out the contracting parties. And this will be still more evident, if, as is usual in most treaties a clause is annexed declaring it to be perpetual, or made for the good of the Kingdom, or with the King himself and his

successors, and it will also be considered a real treaty. . . .

"Other forms too besides those already named, and the subject itself, will frequently supply no improbable grounds for conjecture. But if the conjectures are equal on both sides, it will remain that favourable treaties are supposed to be real or permanent. . . . All treaties of peace or commerce are favourable."

It should be called to the attention of the Court that the treaty in question by its very terms [see Art. I, Appx. A] is binding on the government of Serbia (not merely on its King) and that it specifically provides [Art. XI] that it shall continue in force "for a period of six months after either of the contracting *governments* shall have given notice of a purpose to terminate it."

The Trial Judge apparently took the view [R. p. 57] that all treaty rights and obligations of Serbia terminated in 1919 unless the Kingdom of the Serbs, Croats and Slovenes was merely a "continuation" of the Kingdom of Serbia. Concluding that the Kingdom of the Serbs, Croats and Slovenes was not such a "continuation," but a "new" Kingdom, the Court below held that it neither acquired the rights nor became subject to the obligations of treaties previously entered into by Serbia. What the Trial Judge meant by "continuation" is not clear, but he apparently felt that if more than a change in name (*e.g.*, Persia to Iran, Siam to Thailand, Chosen to Korea) or relatively minor territorial and population accretions (*e.g.*, the transfer of certain Czech territory to Germany as the result of the Munich Agreement) was involved, a "new" state, free of treaty obligations and shorn of treaty rights was necessarily created.

This, appellants submit, is not the proper view. Treaties will survive, and continue in force and effect, under accepted principles of international law, where the contracting power retains its juridical entity, notwithstanding union with or absorption of extensive territories and populations, or where the resulting State is the successor to the contracting power.

II.

The Kingdom of the Serbs, Croats and Slovenes Has Juridical Continuity With the Former Kingdom of Serbia and Accordingly the Treaty Rights and Obligations of Serbia Were Transferred to the State of the SCS.

(1) The Formation of the Kingdom of Serbs, Croats and Slovenes.

As the Treaty here in issue was entered into in 1901 by the United States and Serbia and the demanding government herein is the Federal Peoples' Republic of Yugoslavia, it may be of assistance to the Court briefly to outline at this point the historical points marking the transition from Serbia to Yugoslavia.

Serbia (or Servia, which was then the common spelling) was in 1901 an independent, sovereign state. One of several contiguous areas populated by Yugo, or South, Slavs (Serbs, Croats, Slovenes, Macedonians, Montenegrins are South /or Yugo/ Slav nations), Serbia's absolute independence was recognized by the Treaty of Berlin in 1878 after centuries of Turkish rule and dependence. As a result of the Balkan Wars of 1912-13, Macedonia was also liberated from the Turks, and the larger part of that area was annexed to Serbia. In 1901, the only other Yugoslav people to have achieved

independence were the Montenegrins, who had in fact maintained their independence through the centuries notwithstanding the efforts of the Turks to conquer them. However, Montenegro's independence was not actually recognized until the Treaty of Berlin in 1878. All other Yugoslav regions continued under foreign rule until 1918, as follows:

(1) Bosnia and Herzegovina were a Turkish province until 1908, although pursuant to the Treaty of Berlin, they had become an Austrian mandate in 1878 and were occupied and governed by that country. In 1908, Bosnia and Herzegovina were annexed by the Austro-Hungarian Monarchy, of which they became an integral part with limited autonomy in local matters. Klobuk, the village in which the Appellee was born in 1900 is in Herzegovina, not Croatia as the District Court [R. 49] states.

(2) Croatia and Slavonia, long under Hungarian domination, were reunited with Hungary under the so-called "Compromise" in 1868, after twenty years of separation, resulting from the Hungarian revolt against Austria in 1848. Integral parts of the Austro-Hungarian Monarchy, they were permitted only limited autonomy in local matters.

(3) Dalmatia and Carniola, and Carinthia, Styria and Istria (we are concerned only with parts of the latter three) were Austrian provinces and integral parts of the Austro-Hungarian Monarchy enjoying various degree of restricted autonomy in local matters.

(4) Vojvodina (Banat, Backa and Baranja), Medjumurje and Prekomurje were incorporated into Hungary and as such were integral parts of the Austro-Hungarian Monarchy.

The unification of the Yugoslavs was effected in 1918 (upon the disintegration of the Austro-Hungarian Monarchy resulting from World War I) by the voluntary *union with Serbia* of Montenegro and the regions of the former Austro-Hungarian Monarchy referred to above. The unified state of the Yugoslavs was first called the Kingdom of the Serbs, Croats and Slovenes, later the Kingdom of Yugoslavia, and since World War II, the Federal People's Republic of Yugoslavia.

Although the unification of the Yugoslavs into one nation with Serbia as its nucleus was achieved upon the defeat of the Austro-Hungarian Empire, it was in no sense a creation of the victors in their own interests. On the contrary, the Yugoslav unity realized in 1918 was the culmination of the centuries of persistent and continuous struggle which the South Slavs had waged against foreign conquerors, the Venetians, Turks, Austrians and Hungarians. In the course of their long struggle for liberty they had become conscious of their mutual interests and of the necessity for ultimate unity if they were to maintain the independence they were certain some day to win. This consciousness found expression in common cultural movements and political cooperation to the extent permitted by the circumstances. The partial independence won by Serbia in two uprisings (1804 and 1815) and the complete independence finally achieved by that country in 1878, gave the Yugoslav movement for liberty and union not only a great impetus, but a rallying point. A free Serbia provided the core around which Yugoslav independence and unity could be built. But the goal was to be achieved slowly, for not only were there the powerful conquerors to defeat, but the Balkans, on the cross-roads between East and West, were subject to

other pressures and interests. However that may be, by the beginning of the twentieth century, the accomplishment of Yugoslav freedom and unity was considered an imminent task, and the successes of Servia and Montenegro in the Balkan Wars of 1912-13 brought both encouragement and a sense of reality to these twin ideals.

This course of development is reflected in the broad activity on the part of all Yugoslav peoples during World War I. Thus, the Serbian Government announced on December 7, 1914, that it considered the war as being "a struggle for the liberation and unification of all our unliberated brethren, Serbs, Croats and Slovenes" (F. Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes (Zagreb, 1920) 10). The same aim was repeated on August 23, 1915 (*id.* 42). This view was also expressed by Yugoslav leaders who had fled Austria-Hungary and taken refuge in Allied countries. Thus, in refuting a statement of Count Tisza, Hungary's Premier, the Croatian Committee in Rome, forerunner of the Yugoslav Committee organized in London in 1915, announced through the press that Tisza's "efforts to separate the cause of the Croatian people from that of the Serbian people will remain futile" and that "the Croats have always declared that their ultimate goals were identical with the goals of their Serbian brethren" (*id.* 13). The Yugoslav Committee, organized in London by political and other refugees from Austria-Hungary and supported by Yugoslav immigrants everywhere, on May 6, 1915 addressed a Memoire to the governments of France, Great Britain and Russia in which it stated that "the struggle of Serbia and Montenegro is not a struggle of conquest to expand their borders; these two Serbian

states are protagonists in the liberation of all Yugoslavs and their task is the task of all of us" (*id.* 25). More specifically, on December 18, 1916, upon the accession of Karl of Hapsburg to the thrones of Austria-Hungary, the Yugoslav Committee proclaimed that "all those territories inhabited by people of the same blood but bearing different names, the Serbs, Croats and Slovenes, should be taken from the Hapsburg dynasty and united with the Kingdom of Serbia" (*id.* 84).

In July, 1917, representatives of the Yugoslav Committee and of the Serbian Government met on the Island of Corfu and discussed "all questions pertaining to the future of a unified state of Serbs, Croats and Slovenes." Out of this meeting came the Corfu Declaration of July 20, 1917, which reaffirmed "the only and inalienable demand of our people * * * the basis of the principle of free self-determination of peoples, to be liberated from all foreign enslavement and united in one free, national and independent state." On July 29, 1917, the Montenegrin Committee for National Unification announced its acceptance in full of the Corfu Declaration and the union of Montenegro with a united Yugoslav nation (*id.* 100). Freedom and union in a Yugoslav state was the unalterable demand, and when on January 9, 1918, Lloyd George proposed to the British Parliament the federalization of Austria-Hungary as a possible solution of the problem, the Yugoslav Committee rejected his suggestion and confirmed its irrevocable position as set out in the Corfu Declaration (*id.* 112-3).

Meanwhile, Yugoslavs within Austria-Hungary were not quiescent. Thus, on January 31, 1918, the Yugoslav Club, which consisted of Yugoslav deputies in the Austrian Parliament, demanded the recognition of the right

"of self-determination of peoples especially regarding the question of whether they desire a free state and the form in which they want it established" (*id.*, 120). The time of this demand is especially significant as it followed closely upon the capitulation of Russia to the Central Powers and peace negotiations at Brest-Litovsk. More specifically, on March 3, 1918, a conference of forty-three Croatian, Serbian and Slovenian political leaders in Austria-Hungary announced that "we demand our national independence and a state of Slovenes, Croats and Serbs founded on demoncratic principles" (*id.*, 126).

By the middle of 1918, the movement in Austria-Hungary toward Yugoslav unification began to take a more concrete form. On August 17, 1918, a National Committee was organized in Ljubljana in Slovenia, "as part of the general Yugoslav Committee." On October 6, 1918, the National Council of Slovenes, Croats and Serbs was established in Zagreb in Croatia as "the political body representing all Slovenes, Croats and Serbs" within the Austro-Hungarian Monarchy and its announced program was the "unification * * * into a national, free and independent state of Slovenes, Croats and Serbs, with a democratic form of government (*id.*, 174). The membership of the Council included representatives of all political parties of all the Yugoslav provinces or Austria-Hungary except Vojvodina.

On October 19, 1918, the National Council rejected Emperor Karl's proposal to reorganize the Austro-Hungarian Monarchy on federal lines and ten days later proclaimed the establishment of the "state of Slovenes, Croats and Serbs" (*id.*, 211). The same day the Croatian Sabor (Assembly) declared the independence of Croatia and Slavonia from Austria-Hungary and their adherence to

the "common national sovereign state of Slovenes, Croats and Serbs on the entire ethnographic territory of those people" as the supreme authority of which the National Council was recognized (*id.*, 195, 196, 201). On November 8, 1918, the Serbian government, by an agreement reached at Geneva, recognized the National Council as "the lawful government of the Serbs, Croats and Slovenes dwelling in territory of the Austro-Hungarian Monarchy" (*id.*, 233). On November 24, 1918, the National Council resolved to "proclaim the unification of the State of the Slovenes, Croats and Serbs * * * with the Kingdom of Serbia and Montenegro into a unified State of Serbs, Croats and Slovenes" (*id.*, 255, 256). On November 26, 1918 the Great National Assembly of Montenegro submitted to the Serbian government its decision to unite with Serbia and to become a part of the State of Serbs, Croats and Slovenes. At the same time the Great National Council of Vojvodina, too, passed the same decision. On December 1, 1918 the unification of the Yugoslav people with Serbia was officially announced in Belgrade.

The subsequent forging of a unified Yugoslav state was not without its difficulties, for there naturally were differences of opinion with respect to the principles which should underlie the state and the organization of its government. However, there was no difference of opinion with respect to the basic principle—unification.

The foregoing survey shows clearly that during the course of World War I not only Serbia, which was one of the Allies, participated in the creation of the state of

Serbs, Croats and Slovenes, but also that representatives of Yugoslav peoples under Austro-Hungarian rule played a great role in, and made a major contribution to the unification of the South Slavs into one nation with Serbia. In this connection it will be noted that while at the outset the leadership was taken on behalf of the Yugoslav peoples in Austria-Hungary by exiles living elsewhere, in the last stages of the war they were joined by Yugoslavs who had remained in Austria-Hungary. The position of Serbia as a sovereign state enabled her to play in the unification of the Yugoslav peoples a role similar to that which Piemont (Sardinia) had played in the unification of the Italian nation.

In analyzing the historic development of the unification of Yugoslavia, the District Court made a number of inaccurate statements, which require rectification. We have already referred to the fact that Klobuk, where the Appellee was born in 1900, is in Herzegovina and not Croatia. At the time of the Appellee's birth, Herzegovina, as already indicated, was a Turkish province under Austrian-Hungarian mandate. Herzegovina is not, and was at no time a part of Croatia. In stating above that after the Balkan wars of 1912-13, the larger part of Macedonia was incorporated into Serbia, we have already indicated the error of the District Court in stating that Macedonia became part of Greece [R. p. 50].

The Court was also in error in stating that the National Council of Croats, Slovenes and Serbs, representing Yugo-

slavs within the boundaries of the Austro-Hungarian Monarchy also included representatives of Serbia. Serbia was never represented on this Council [R. p. 51].

The Court also was in error in stating that the United States in February, 1919, recognized the Serb-Croat-Slovene state as consisting of "all the Serbian, Croatian and Slovenian provinces within * * * the former Austro-Hungarian Monarchy and Montenegro" [R. p. 52]. Actually the United States welcomed the "union of the Serbian, Croatian and Slovenian provinces within the boundaries of the former Austro-Hungarian Monarchy *to Serbia*" and recognized "the Serbian legation as the legation of the Serbs, Croatians and Slovenes" (1 Hackworth, Digest of International Law, 221). Thus, the Court disregarded the juridically relevant fact that the creation of the state of the Serbs, Croats and Slovenes resulted from the union of the Yugoslav provinces of Austria-Hungary and Montenegro *with Serbia,* a sovereign, independent and internationally recognized state, which could juridically survive the unification. The Court avoids mentioning Serbia to which precisely the union was accomplished and the international juridical system of which survived becoming the international juridical system of the united Serb-Croat-Slovene State.[3]

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[3]The foregoing material dealing with the formation of the Kingdom of the Serbs, Croats and Slovenes was prepared and submitted for inclusion in the brief by the Yugoslav Foreign Office. The reference from which the source material was taken, *F. Sisic, Documents on the Creation of the Kingdom of the Serbs, Croats and Slovenes* (Zagreb, 1920), apparently is available only in the Library of Congress. No. D651,Y 885 (Ferdinand Sisic: Dokumenti o postanku kraljevine Srba, Hrvata i Slovenaca, Zagreb, 1920).

(2) Official Interchange of Correspondence.

The Government of the United States was formally and officially advised by the Government of the Kingdom of Serbia of the development leading to the formation of the Serb-Croat-Slovene state by means of the following communications addressed to the Secretary of State by the Serbian Chargé d'Affaires in Washington:

(This and the succeeding communications appear as footnotes to the lower court's opinion beginning at page 83 of the Record. It appears in an official publication entitled Foreign Relations of the United States, 1919, Vol. II, Publication No. 661, Department of State, Government Printing Office, 1934.)

No. 176

Washington, November 11, 1918.

"Your Excellency: I have the honor to inform your excellency that the Serbian Government has recognized the National Council in Zagreb as the legitimate representative of the Serbians, Croatians and Slovenes who are residing within the boundaries of the former Austro-Hungarian Monarchy until the definite organization of one state which will comprise all Serbians, Croatians and Slovenes, when the Serbian Government and the National Council will create one common government who will protect the rights of the nation of all Serbians, Croatians and Slovenes.

"Until the organization of this Government Mr. Troumbitch, President of the Yugoslav Committee in London, has been entrusted with the mandate to represent the National Council in Zagreb with the Allied Governments.

"In bringing the above to the knowledge of Your Excellency I beg to present that the Serbian Government anticipates that the United States Government will recognize the National Council in Zagreb, the members of whom have been elected by the Parliament, as the legitimate government of the Yugoslavs (Serbians, Croatians and Slovenes) living within the boundaries of the former Austro-Hungarian Monarchy, and consider that government and its army as an ally.

"With renewed assurances, (etc.)

Y. Simitch."

Washington, undated

(Received January 6, 1919).

"Mr. Secretary: I am instructed by my Government to submit herewith the following communication:

"In accordance with the *decision* of the Central Committee *of the National Council of Zagreb which represents the State of all the Serbian, Croatian and Slovene provinces within the boundaries of the former Austro-Hungarian Monarchy,* a special Delegation has arrived at Belgrade on the 1st of December. This Delegation by one (a) solemn address, presented to his Highness the Crown Prince, has proclaimed the Union of all the Serbian, Croatian and Slovene provinces of the former Dualist Monarchy into one single State *with the Kingdom of Serbia* under the Dynasty of His Majesty King Peter and under the regency of the Crown Prince Alexander. In reply to this address His Royal Highness the Crown Prince has proclaimed the Union of Serbia with the above mentioned independent State

of Slovenes, Croats and Serbs into one single Kingdom: 'Kingdom of the Serbs, Croats and Slovenes', His Highness has accepted the regency and will form a common Government. On the 17th of December His Royal Highness the Crown Prince received in audience a delegation from Montenegro. This delegation has submitted to His Highness on the 26th of November the decisions of the Great National Assembly of Montenegro. By virtue of these decisions His Majesty King Nikolas I, and his dynasty have been declared destitute of all the rights upon (to) the throne of Montenegro and the Kingdom of Montenegro, united to Serbia under the dynasty of Karageorgevich, is included in the Kingdom of the Serbs, Croats and Slovenes. His Royal Highness the Crown Prince has declared that He accepts with pleasure and thanks these decisions. A common government for the new Kingdom has been organized on the 21st of December. The Legations, Consulates and other Missions of the Kingdom of Serbia will be the Legations, Consulates and other Missions of the Kingdom of the Serbs, Croats and Slovenes.

"Bringing the above to the knowledge of the United States Government, *the Serbian Government* is strongly convinced that their communication will be met sympathetically: The Union of all the nations of the Serbs, Croats and Slovenes in one single state, which results from the imprescriptible right of the people to dispose of their destiny.

"I take (etc.)

Y. Simitch."

Official cognizance was given by the United States to these events by two significant diplomatic communications. The first [R. p. 89] was a telegram from the

Commission to Negotiate Peace to the Acting Secretary of State, from Paris, February 6, 1919, reading as follows:

> "The Secretary of State will give out on February 7th the following statement in regard to the union of the Jugo Slav peoples, which you may give out to the press immediately:
>
> " 'On May 29, 1918, the Government of the United States expressed its sympathy for the nationalistic aspirations of the Jugo Slav race and on June 28 declared that all branches of the Slavish race should be completely freed from German and Austrian rule. After having achieved their freedom from foreign oppression the Jugo Slav(s) formerly under Austria-Hungarian rule on various occasions expressed the *desire to unite with the Kingdom of Serbia. The Serbian Government on its part has publically and officially accepted the union* of the Serb, Croat and Slovene peoples. The Government of the United States, therefore, welcomes the union while recognizing that the final settlement of territorial frontiers must be left to the Peace Conference for determination according to desires of the peoples concerned.' "

The second of these communications, even more significant as it constituted the official recognition by the United States Government of the union with Serbia of the provinces within the former Austro-Hungarian Empire and Montenegro is the following communication, dated February 10, 1919, addressed by the Acting Secretary of State to the Serbian Legation [R. p. 89]:

> "Sir: I have the honor to acknowledge the receipt of an undated Note from the Serbian Charge d'Affaires stating that in accordance with a deci-

sion of the Central Committee of the National Council of Zagreb, representing the State of all the Serbian, Croatian and Slovene provinces within the boundaries of the former Austro-Hungarian Monarchy, the Serbian Crown Prince has proclaimed the union of all the Serbian, Croatian and Slovene provinces of the former Dualist Monarchy with the Kingdom of Serbia in a single state all under the title of 'Kingdom of the Serbs, Croats and Slovenes' and under the regency of the Crown Prince Alexander.

"The Department further notes the statement contained in the Note that in accordance with the decision of a body proclaiming itself the Great National Assembly of the Kingdom of Montenegro, His Majesty King Nikolas I, and his dynasty, had been deposed from the throne of that country and had decreed the union of Montenegro with the Kingdom of the Serbs, Croats and Slovenes, and that this decision had been accepted by His Royal Highness the Crown Prince of Serbia.

"The Department further notes the statement that the Legation of Serbia in the United States will, hereafter, *be known as the Legation of the Kingdom of the Serbs, Croatians and Slovenes.*

"In reply I have the honor to inform you that the Government of the United States *welcomes the union of the Serbian, Croatian and Slovene provinces within the boundaries of the former Austro-Hungarian Monarchy to Serbia and recognizes the Serbian Legation as the Legation of the Kingdom of the Serbs, Croatians and Slovenes.*

"In taking this action, however, the United States Government recognizes that the final settlement of

territorial frontiers must be left to the Peace Conference for determination according to the desires of the peoples concerned."

It is this communication to which the Court apparently refers [see R. p. 52] in its statement that "In February 1919 the United States recognized the Serb-Croat-Slovene State as consisting of 'all the Serbian, Croatian and Slovene provinces within the countries of the former Austro-Hungarian Monarchy and Montenegro.'" This is entirely incorrect as can be seen from the documents referred to above.

Quite to the contrary, the Kingdom of Serbs, Croats and Slovenes, or the Serb-Croat-Slovene State, as the Court called it, consisted of:

1. The Kingdom of Serbia, an independent Kingdom, an ally of the United States in World War I, and an existing international juridical entity to which the other elements were joined.
2. The former Kingdom of Montenegro.
3. The provinces formerly under the domination of Austria-Hungary, populated by Serbs, Croats and Slovenes (Yugoslavs) and for this reason referred to as Serbian, Croatian and Slovene provinces of Austria-Hungary.

Appellants submit that a very different conclusion might be justified had the Kingdom of the Serbs, Croats and Slovenes been merely an amalgamation of the Yugoslav provinces liberated from the subjugation of Austria-Hungary in World War I. Then there would have been no existing International Person or entity with which they had merged, attached or united. But the true and

undisputed fact is that the Kingdom of Serbia was an existing International Person, a juridical entity. To this state as a nucleus, the other Yugoslav people cleaved. That they were welcomed and accepted upon a basis of equality does not weaken the continuity, juridically speaking, of the International Person in altered form.

On September 10, 1919, a treaty was signed by representatives of the Principal Allied and Associated Powers and Serb-Croat-Slovene State, known as the Treaty of St. Germaine-en-Laye (on the protection of minorities) [see R. p. 58, 3 Malloy (Redmond) 3731, Sen. Doc. No. 348, 67th Cong., 4th Sess.]. Probably because of the recent refusal of the United States Senate to ratify the Treaty of Versailles, and because of the inclusion in it of material treating with the League of Nations, this Treaty of St. Germaine-on-Laye was never presented for ratification by the Senate. Lodge, *The Senate and the League of Nations* (Scribner, 1925, p. 303). It was ratified and became effective between the British Empire, France, Italy, Japan and the Serb-Croat-Slovene State.

This treaty provides in part that all treaties, etc., of Serbia shall *ipso facto* be binding upon the Serb-Croat-Slovene State.

The Trial Court in its opinion [R. p. 62] states that if these treaties automatically became binding as we contend, it would have been unnecessary to have put in such a provision.

But the recitals in the treaty also state that it is desired to free Serbia from certain specific treaty obligations in the Treaty of Berlin. Conversely, if the treaty obligations of Serbia did not survive, it would have been unnecessary to have relieved the Kingdom of the Serbs,

Croats and Slovenes of these obligations by the treaty of St. Germaine-en-Laye.

Appellants set forth at some length excerpts from this Treaty of St. Germaine-en-Laye. It is not contended, of course, that this treaty became effective with the United States of America and thus recreated or revived a terminated obligation. It is cited simply to show an open international recognition of:

1. The continuation of the juridical entity of Serbia into the enlarged state of the Serbs, Croats and Slovenes.
2. The *ipso facto* succession of treaty rights with Serbia.

In support of these contentions, we call the Court's attention to the following provisions of the separate (fourth) Instrument annexed to the Treaty of St. Germain-en-Laye:

> "Whereas since the commencement of the year 1913 extensive territories have been added to the Kingdom of Serbia, and
>
> "Whereas the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy have of their own free will determined to unite with Serbia in a permanent union for the purpose of forming a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes, and
>
> "Whereas, the Prince Regent of Serbia and the Serbian Government have agreed to this union, and

in consequence the Kingdom of the Serbs, Croats and Slovenes has been constituted and has assumed sovereignty over the territories inhabited by these peoples, and

"Whereas, it is necessary to regulate certain matters of international concern arising out of the said additions of territory and of this union, and

"Whereas, *it is desired to free Serbia from certain obligations which she undertook by the Treaty of Berlin of 1878* to certain Powers and to substitute for them obligations to the League of Nations, and

"Whereas, the Serb-Croat-Slovene State of its own free will desires to give to the populations of all territories included within the State, of whatever race, language or religion they may be, full guarantees that they shall continue to be governed in accordance with the principles of liberty and justice . . ."

Chapter II, Article 12 of this Instrument provides further:

"Pending the conclusion of new treaties or conventions, *all treaties,* conventions, agreements and obligations *between Serbia,* on the one hand, *and any of the Principal Allied and Associated Powers,* on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, *shall ipso facto be binding upon the Serb-Croat-Slovene State.*" (Emphasis supplied.)

This Instrument to the Treaty of St. Germain-en-Laye does not create the treaty rights of Serbia, nor does it recreate or revive a right which has ceased to exist. It simply recognizes them as an existing condition.

Webster's New International Dictionary (2d Ed.) defines *"ipso facto"* as follows: "By the fact or act itself; as the result of the mere act or fact; *by the very nature of the case.*"

Reduced to these words this Instrument to the Treaty of St. Germain states: All treaties between Serbia and any of the Allied and Associated Powers . . . shall *by the very nature of the case* be binding upon the Serb-Croat-Slovene State.

The recital of a fact as existing does not *create* the fact, contrary to the conclusion of the Trial Judge.

The Trial Court took cognizance [R. p. 91] of the opinion of Charles Evans Hughes, United States Secretary of State, who on June 4, 1921, in speaking of treaties with Serbia, wrote:

> "No formal understanding has been reached with the Government of the Kingdom of SCS as to the application of these agreements to the territory of that country which formerly belonged to the Austro-Hungarian Empire. It is the opinion of the Department that the treaties may properly be regarded as applicable to that territory." (V. Hackworth, Digest of International Law, 375.)

The Trial Court discounts the weight of this opinion because it was given in the form of private communication in a non-adversary proceeding. Yet it must be

pointed out that the communication in question was not private communication, but an official one of the Secretary of State, as such, with respect to a matter peculiarly within his official charge. That it was directed to American citizens and not a foreign power does not make it "private." Moreover, that the question involved was one of law, and that the Secretary of State who wrote it was one of our greatest lawyers and later became Chief Justice of the United States, should cloak it with more than usual authority.

Moreover, the Trial Court wholly overlooked an official communication from the Yugoslav Charge d'Affaires to Secretary of State Hughes on September 29, 1921, when in response to an inquiry, it was stated:

> ". . . The Government of the Kingdom of the Serbs, Croats and Slovenes considers the treaties and conventions concluded between the Kingdom of Serbia and the United States as applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes as constituted at the present." (V. Hackworth, Digest of International Law, 374, 375.)

(3) Recapitulation of Points Demonstrating the Survival of the Juridical Entity of Serbia.

For the convenience of the Court, it may be well to summarize at this time the various elements, factors, circumstances and points hereinbefore discussed which, Appellants submit, are, alone, sufficient to reverse the conclusion of the Trial Court that the treaty rights of Serbia did not survive to the Kingdom of the Serbs, Croats and Slovenes:

(1) The Kingdom of Montenegro declared its union with Serbia under the Dynasty of Karageorgevitch, the

Royal House of Serbia, and was included in the Kingdom of Serbs, Croats and Slovenes.

(2) Vojvodina took the same decision.

(3) The Council of Slovenes, Croats and Serbs, proclaimed the union of the Yugoslav provinces formerly within the Austro-Hungarian Monarchy with Serbia.

(4) The Serbian Legation officially informed the United States of the formation of the Kingdom of the Serbs, Croats and Slovenes.

(5) The United States of America welcomed the union of the "provinces within the boundaries of the former Austro-Hungarian Monarchy *to Serbia.*"

(6) The Karageorgevitch Dynasty was proclaimed to be and accepted as the dynasty of the Serb-Croat-Slovene State.

(7) Belgrade, the capital of Serbia, continued as the capital of the united state.

(8) Serbian diplomatic representatives (the legations, consulates and missions) became the representatives of the Serb-Croat-Slovene State.

(9) The Treaty of St. Germain-en-Laye recognized the *ipso facto* succession of treaty rights and obligations of Serbia.

(10) By direct communication the Government of the Serb-Croat-Slovene State stated that it considered the Serbian Treaties as applicable to the whole territory.

III.

The Question of Succession of States and Survival of Treaty Rights and Obligations Presents a Political Issue Upon Which the Decision of the Executive Branch of the Government Is Controlling.

Appellants contend that the material hereinbefore set out demonstrates the projection of the juridical entity of the Kingdom of Serbia into the Kingdom of the Serbs, Croats and Slovenes. Moreover a decision to this effect has already been made by the Executive Branch of the United States Government (viz.: The State Department) and we contend that this political decision is, under the prevailing rule, determinative of the matter and binding upon the courts. This discussion will fall into three sections:

(1) The Rule of Political Decision,

(2) Evidence of the Political Decision, and

(3) Action taken pursuant to the Political Decision.

The Constitution of the United States in enumerating the powers of the President, provides (Art. II, Sec. 2):

> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . ."

Appellants do not for a moment contend that the State Department by its own *"ipsi dixit"* [see R. p. 45 for the Trial Judge's views thereon] can *create* a treaty. Appellants do contend, however, and vigorously urge that the question whether a treaty, duly ratified by the Senate, is applicable, both as to rights and obligations thereunder, to

a foreign country notwithstanding territorial and governmental changes is in its nature political and not judicial and that the courts should accept the conclusions of the Political Department in that regard.

Note here that we refer to power *remaining* in a foreign State to carry out its obligations.

It is *not* contended that the State Department could by its own *fiat transfer* treaty obligations from one International Person to another International Person. To draw an absurd illustration, the State Department could not determine that Serbian treaties applied to Norway or Venezuela. That would certainly violate the Constitutional limitation and usurp the treaty making prerogatives of the Senate.

Where, however, the determination to be made is whether or not the juridical entity of a nation extends into and continues in the form of a successor, that decision is peculiarly within the province of the Executive Branch of the government represented by the State Department which is familiar with the factual background. Particularly is this true where the treaty is executory in nature and requires positive action on the part of the Executive Branch.

The trial court seemed to indicate the view that the acceptance of the political decision indicated in *Terlinden v. Ames, infra,* would infringe on the treaty powers reserved to the Senate under Article II, Section 2 of the Constitution. But the decision is only that the other Contracting Party retains the power to meet treaty obligations. This in no way usurps any right of the legislative department, for *the legislative branch at all times has the power to declare a treaty abrogated.* (See *Chung Yim v.*

United States, 78 F. 2d 43, 46, citing: *Boudinet v. United States,* 11 Wall. 616, 20 L. Ed. 227; *Cheung Sum Shee v. Nagle,* 268 U. S. 336, 45 S. Ct. 539, 69 L. Ed. 985; and *Head Money Cases,* 112 U. S. 580, 5 S. Ct. 247, 28 L. Ed. 798.)

Let us proceed then to consideration of:

(1) The Rule of Political Decision.

Appellants respectfully contend that the views expressed by the United States Supreme Court in the leading case of *Terlinden v. Ames* (1902), 184 U. S. 270, 22 S. Ct. 484, 46 L. Ed. 534, are controlling on this phase. Since the case has been the subject of much study by counsel for all parties and by the trial court, it will be discussed herein at some length.

The case arose when the German Consul at Chicago filed an extradition complaint as the duly accredited agent of the German Empire and also the Kingdom of Prussia (forming a part of said German Empire) charging certain offenses by one Gerhard Terlinden. Ames was the United States Marshal who had custody of the accused.

In the Habeas Corpus proceedings two treaty questions were raised. The accused denied the existence of any treaty between the United States and the German Empire, and secondly, asserted that the extradition treaty with the Kingdom of Prussia of 1852 had terminated by the creation of the German Empire in 1871. This historical background as outlined by the Court is as follows: In 1852 the United States and the King of Prussia entered into an extradition treaty. At that time Prussia was a member of a loose grouping of German states styled the Germanic Confederation, and the treaty provided that it

would be applicable not only to Prussia but also to certain specified members of the Germanic Confederation on whose behalf, as well as on its own, Prussia was acting, and to such other members of the Germanic Confederation as might later accede to it. In 1866 the Germanic Confederation became extinct and another loose grouping of German states, the North German Union or Confederation, was formed under the presidency of the King of Prussia. A treaty relative to naturalization entered into between the United States and Prussia in 1868 extended the applicability of extradition treaty of 1852 to all the States in the North German Union or Confederation. In 1871 the German Empire was founded by the union of the states belonging to the North German Union or Confederation and other German states, and a constitution was adopted whereby the King of Prussia became the German Emperor, imperial laws took precedence over those of the individual states, and jurisdiction over foreign affairs was placed in the imperial government.

The Court stated in part:

> "It is contended that the words in the preamble translated 'an eternal alliance' should read 'eternal union,' but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a Confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, *it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that the treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor.* We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the Status of the Kingdom

of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, *governmental action in respect to it must be regarded as a controlling importance.* During the period from 1871 to the present day extradition from this country to Germany, and from Germany to this country has been frequently granted under the treaty which has thus been repeatedly recognized by both governments as in force." (*Terlinden v. Ames, supra.*)

It was to the last few words to this quotation to which the trial court referred [R. p. 46], implying that the action by which the government could recognize the existence of the treaty must be by extradition proceedings alone. Under a later heading appellants will show governmental action by *both* governments involved "repeatedly recognizing" the treaty obligations of Serbia as continuing in force.

After reciting an exchange of correspondence somewhat similar to the communication received from the Serb, Croat, Slovene State in September, 1921, recognizing the Serbian treaties as applicable to its entire territory, the Court in *Terlinden v. Ames* further states:

"Thus it appears that the German Government has officially recognized and continues to recognize the treaty of June 16, 1852 as still in force . . ."

And further:

> *"It is out of the question that a citizen of one of the German States, charged with being a fugitive from its justice, should be permitted to call on the courts of his country to adjudicate the correctness of the conclusions of the Empire as to its powers, and the powers of its members, and especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly."* (Emphasis added.)

What wording could fit the instant case more perfectly?

In support of the reasons underlying this rule the Court in *Terlinden v. Ames,* the Supreme Court goes on to cite the case of *Doe v. Braden,* 16 How. 635, 656. In that case, Chief Justice Taney in declaring it to be the duty of the courts to interpret and administer a treaty according to its terms, said:

> "And it would be impossible for the Executive Department of the Government to conduct our foreign relations with any advantage to the country and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power by its constitution and laws, to make the engagements into which he entered."

Further quoting from *Terlinden v. Ames:*

> "We concur in the view that *the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard."* (Emphasis added.)

The Court goes on to show the distinction between a treaty to be considered or interpreted as a law where it operates itself without the aid of any legislative provision, and a situation where the treaty requires either party to perform a particular act (such as to deliver custody of the accused).

> "Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Foster v. Neilson,* 2 Pet. 314, 7 L. Ed. 435, thus: 'Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, *when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department.*'
>
> "*. . . It cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both governments had proceeded had terminated by reason of the adoption of the German Empire, notwithstanding the judgment of both governments to the contrary.*" (Emphasis added.)

We interrupt the quotation from *Terlinden v. Ames, supra,* at this point to comment that the foregoing language is brought more clearly into focus if we consider the very nature of an extradition proceeding, and the manner and mode in which the fugitive is delivered to the demanding government.

Section 3184, Title 18, U. S. C. provides for the provisional arrest and detention of a fugitive upon a

warrant issued by a Judge or Commissioner. A hearing is then held "to the end that evidence of criminality may be heard and considered." The section then provides:

> "If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention *he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person,* according to the stipulations of the treaty or convention; . . ." (Emphasis added.)

Section 3186 then provides:

> *"The Secretary of State may order the person committed* under sections 3184 or 3185 of this title *to be delivered* to any authorized agent of such foreign government, to be tried for the offense of which charged." (Emphasis added.)

The formal compliance with the requirements of the treaty is executed by the political department. The only recourse of the fugitive to the courts is by way of Habeas Corpus, not by appeal nor review. The "appeal," or ultimate determination of the case lies with the Department of State.

Nor is it unusual for the courts to accept the political determination of the Executive Branch in matters involving treaty rights and obligations of foreign governments. On the contrary, this is the usual practice, for the President "is the sole organ of the federal government in the field of International Relations." (*United States v. Pink*, 315 U. S. 203, 229; *Cf. In re Cooper,* 143 U. S. 472; *Taylor v. Morton,* 2 Curtis 454, 459, Fed. Cas. No.

13,799; *Union of Soviet Socialist Republics v. National City Bank,* 41 Fed. Supp. 353; *Chicago & S. Airlines v. Waterman,* 333 U. S. 103.)

(2) Evidence of the Political Decision.

We turn now to the matter of how the political decision has been indicated.

We have already adverted to the official opinion of the Secretary of State (later Chief Justice) Hughes in June, 1921, that the treaties theretofore concluded between the United States and Serbia were applicable to the Kingdom of the Serbs, Croats and Slovenes, and to the official confirmation of that view by the Yugoslav Charge d'Affaires in September, 1921. Their views related to all such treaties, there being three—the extradition treaty here in issue, the Convention of Commerce and Navigation of 1881 and the Consular Convention of the same year.

However, during the 1920's Yugoslavia expressed a desire to negotiate a new extradition treaty—one which would conform more closely to the legal concepts then prevailing than the existing treaty did. The United States declined to negotiate a new treaty, on *the express ground that the treaty here in issue was in force and effect and* was sufficiently comprehensive. Thus, on March 23, 1927, Secretary of State Kellogg instructed the American Minister to Yugoslavia as follows:

> "With regard to the negotiation of a new extradition convention you will recall that in instruction No. 543 of January 8, 1925, the Department pointed out that the extradition convention between the United States and Serbia, which is regarded both by this Government and the Government of the Serbs, Croats

> and Slovenes as being applicable to the whole territory of the Kingdom, is a modern and comprehensive convention. Pending the receipt of the more specific information concerning the proposal of the Government of the Serbs, Croats and Slovenes to supplant this convention which it is indicated on page 2 of dispatch No. 2577 of February 14, 1925, would be furnished you, the Department is unwilling to consider the negotiation of a new treaty on this subject." (*Foreign Relations of the United States,* 1927, Col. III, pp. 842-843.)

In 1934, this time the United States Government raised the question of the conclusion of a supplemental extradition treaty, adding to the list of extraditable crimes "crimes or offenses against the bankruptcy laws." The mere reference to a "supplemental" treaty also clearly confirms that the United States Government has always considered the treaty of 1902 valid and in force. (Department of State file No. 211.60H/10; see also Appx. B-1 in *Amicus* Brief.)

Again, when the Yugoslav Minister requested the delivery of the appellee herein as a "war criminal" under the provisions of certain United Nations resolutions, Secretary of State Acheson [R. pp. 80-81] replied on May 14, 1951, that that result could only be achieved by resort to action *"pursuant to the provisions of the Extradition Treaty of October 25, 1901, in force between the United States and Yugoslavia."*

Again, on September 26, 1951, Secretary of State Acheson formally certified that the treaty here in issue was in full force and effect between the United States and The Federal People's Republic of Yugoslavia. Over

the seal of the Department of State he said [Ex. DG-E, see R. p. 362]:

> "That all of the provisions of the said treaty, which entered into force between the United States of America and the Kingdom of Serbia on June 12, 1902, continued in force and were applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes, as constituted on December 1, 1918, and to the Kingdom of Yugoslavia, to which the name of the Kingdom was changed by a law of October 3, 1929;
>
> "And that all the provisions of the said treaty continued in force and became applicable to the Federal People's Republic of Yugoslavia as proclaimed on November 29, 1945 and are presently in force between the United States of America and the Federal People's Republic of Yugoslavia.
>
> "In testimony whereof, I, Dean Acheson, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of said Department, at the city of Washington, in the District of Columbia, this twenty-sixth day of September, 1951."

And on September 28, 1951, the Yugoslav Ambassador duly accredited to the United States, certified to the same effect [Ex. DG-F, see R. p. 372], as follows:

> "To Whom it May Concern:
>
> I, Vladimir Popovic, Ambassador of the Federal People's Republic of Yugoslavia, officially state herewith that the Treaty between the United States and Serbia for the mutual extradition of fugitives from justice signed at Belgrade on October 25, 1901, and the ratifications of which were exchanged at Belgrade on May 13, 1902, has uninterruptedly been in force

between the United States on one side and Serbia, and later Yugoslavia, on the other and that accordingly the provisions of that Treaty are applicable to matters of extradition of fugitives from justice between the United States and the Federal People's Republic of Yugoslavia.

"In testimony whereof, I have hereunto caused the seal of the Embassy of the Federal People's Republic of Yugoslavia to be affixed and signed this document at the city of Washington, D. C., U. S. A. this twenty-eighth day of September, 1951."

Further evidence of open and public recognition of the *decision* that the treaty rights and obligations survived is found in various State Department publications. A compilation entitled *"A List of Treaties and other International Acts of the United States of America in Force December 31, 1932,"* published in 1933, and revised and republished in 1941, lists the Extradition Treaty in 1901, as well as the Commercial and Consular Conventions of 1881 (all with Serbia) as being in force with Yugoslavia. The Treaty of Commerce and Navigation appears in 22 Stat. 964, *II Malloy* 1613. The Consular Treaty is in *II Malloy* 1618.

The loose leaf treaty publication, *"United States Treaty Developments,"* started in 1947 has carried the following statement with regard to Yugoslavia:

"App. III (C) . . . The treaties in force between the United States and Serbia at the time of the formation of the Kingdom of the Serbs, Croats and Slovenes (Dec. 1, 1918) were regarded by the Governments of the United States and the new Kingdom as applicable to the new Kingdom. State Department file 711.60h/1 and 3. The adoption of

> 'Yugoslavia' in place of 'the Kingdom of the Serbs, Croats and Slovenes' as the official title of the Kingdom on October 3, 1929 is understood not to have affected treaty relations."

Additional "evidence" by way of "action" is shown in an agreement signed at Washington July 19, 1948, concerning the settlement of pecuniary claims against Yugoslavia. This agreement appears in *Treaties and Other International Acts Series,* as TIAS 1803, and in *United States Statutes at Large,* Vol. 62(3), p. 2658.

> "The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold or hereafter acquiring assets in Yugoslavia, the rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favorable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, *in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia,* signed at Belgrade, October 2-14, 1881." (Emphasis added.)

Although this agreement refers to the Convention of Commerce and Navigation, it is not the understanding of appellants that evidence of the decision be directed to the Extradition Treaty alone. The *decision* required for the survival of the Convention of Commerce and Navigation rests upon exactly the same factual foundation.

Thus, the *political* decision of the Executive Branch of the Government was made in 1921 and has been continuously adhered to up to the present day. It is that Yugoslavia (by whatever name its government is called)

is bound by the obligations and entitled to the rights of Serbia under all treaties, including the extradition treaty here in issue, between Serbia and the United States.

The *decision,* then, was made in 1921 upon receipt of the assurance that the Serb, Croat, Slovene State considered the Serbian treaties applicable to the Kingdom of the Serbs, Croats and Slovenes. *Evidence* of the decision, open recognition and acceptance of the decision has appeared frequently, in fact in each successive decade to and including the present, as illustrated by the foregoing material.

(3) Action Taken Pursuant to the Political Decision.

This brings us to the consideration of the last subheading under this topic. The trial court, relying on the statement in *Terlinden v. Ames, supra,* that governmental action must be regarded as of controlling importance [See R. pp. 46-47], places considerable stress upon the failure to show that any extradition had been sought by either country since its effective date.

Treaty rights are not of such nature that they are affected by *laches.* Had it been shown that occasions had occurred when fugitives might have been extradited, but that either country failed to press for extradition because they considered the treaty terminated a different situation might be presented.

The mere fact that the criminals of the two countries were such home loving bodies that they did not wish to leave their native shores, or at least did not wish to sojourn in the other country, does not impress the writer as a very strong argument that treaty rights with Serbia did not survive the formation of the Kingdom of the Serbs, Croats and Slovenes.

But there has been government action in other respects than directed to this particular treaty, but *all based upon the identical political decision (concurred in by the Serb-Croat-Slovene State, the Kingdom of Yugoslavia, and the Federated People's Republic of Yugoslavia) that the treaty rights and obligations of Serbia survived into the Serb-Croat-Slovene State.*

The present extradition proceedings is one form of action.

The Convention of Commerce and Navigation, sometimes referred to as the Treaty for Facilitating and Developing Commercial Relations, signed in 1881, has twice been the subject of governmental recognition by action.

One instance was that referred to at the conclusion of the preceding subhead as "evidence." This was the settlement of pecuniary claims against Yugoslavia.

A very similar instance of action is indicated in an agreement between the United States and Yugoslavia appearing in *United States Statutes at Large,* Vol. 61(3), p. 2451, and published in the Treaties and Other International Acts Series, as TIAS 1572. This agreement was effected by an interchange of notes in 1946 and contains the following:

> ". . . the most-favored-nation provisions of the Treaty for Facilitating and Developing Commercial Relations between the United States and Yugoslavia signed October 2/14, 1881 shall not be understood to require the extension to Yugoslavia of advantages accorded by the United States to the Philippines."

Diplomatic and Commercial relations between the two countries have been carried on openly and continuously under the provisions of Serbian treaties.

Consular relations are carried on under the terms of the consular convention of 1881. Yugoslav consular officers carry on their official work on a most-favored-nation basis, bottomed on the existence of a consular convention assuring reciprocal treatment to American consular officers in Yugoslavia.

Likewise under the terms of the Commercial Convention of 1881 above referred to, there has been constant action between nationals of the two countries based upon the governmental decisions. Rights such as those of entry, travel, residence for business purposes, acquisition, possession and disposal of property, exemption from military service, access to courts of justice, inheritance and others have been consistently and continuingly exercised under this treaty.

"Action" has been reflected in proceedings before our courts. In *Lukich v. Department of Labor and Industries* (Wash., 1934), 29 P. 2d 388, the most favored nation clause of the Treaty of Commerce of 1881 (II Malloy 1613) was involved, and the Court said:

> "It is conceded that the present Kingdom of Yugoslavia has replaced and absorbed the Kingdom of Serbia, and that the convention above referred to is now in full force and effect between Yugoslavia and the United States."

In at least two cases the Consular Convention of 1881 between the United States and Serbia has been considered as applying to the Kingdom of Yugoslavia. These are the cases of *Urbus v. State Comp. Comm.,* 113 W.

Va. 563, 169 S. E. 164 (1993), and *Olijan v. Lublin,* 50 N. E. 2d 264 (1943). Since these cases are discussed in the brief *amicus,* they will not be commented on here. They are indicative only of a general acceptance of the fact of survival and action thereunder.

Another example of governmental action was an Act of Congress approved May 30, 1928 (45 Stat. 399), which authorized settlement of the indebtedness of the Kingdom of the Serbs, Croats and Slovenes and in which the debts of the Kingdom of Serbia were incorporated in the total amount.[4]

We would again point out that the 1881 treaties stand on the same ground as the extradition treaties, and emphasize that if the extradition treaty is held not to be in force and effect, *a fortiori,* the 1881 conventions must be held to be nullities with the result that all the enumerated matters now governed by such treaties in accordance with the political decision long since made, would be in jeopardy.

Very recently, on September 24, 1952, the California District Court of Appeal in the case of *In re Arbulich's Estate,* 113 A. C. A. 206, 248 P. 2d 179, accepted a certificate of the Secretary of State identical to Exhibit FG-E [R. p. 362] as to the Treaty of Commerce of 1881 between the United States and Serbia. The case involves reciprocal rights of inheritance. It has not be-

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[4]The analysis of this indebtedness is set out in the Government's *amicus* brief and need not be repeated here.

come final at the time of this writing but is cited as another example of acceptance of the political decision and action thereunder.

Appellants suggest, however, that the *Arbulich* case points the way to the proper approach to all phases of this case. In that opinion, the Court states:

> "The fact that the court disapproved of the form of the government of Yugoslavia was not relevant at all on the issue of reciprocity. Yugoslavia is a sovereign state and is recognized as such by the government of the United States. As long as some right of inheritance is recognized in that state, and the evidence here without conflict discloses that it is, the fact that such right differs from the right of inheritance in this country, or that as an individual a judge may disapprove of the form of government, are factors which are not relevant and should not be considered on the issue of reciprocity. This was clearly pointed out in the Estate of Kennedy, 106 Cal. App. 2nd 621, 235 P. 2nd 837, involving Romania, a country that is not only communistic, but within the sphere of influence of Russia, which Yugoslavia certainly is not. Some degree of socialization and nationalization has taken place in most European countries, a policy we as individuals may or may not approve, but as judges passing on the issue of reciprocity, the form of such governments is a false factor, and a matter for each sovereign country to determine for itself."

Conclusion.

(Reference to Bail.)

The issue to be determined is whether the treaty rights and obligations existing with Serbia prior to 1919 have survived and are now in force between the United States of America and the Federated People's Republic of Yugoslavia. Specifically, under the ruling of the trial court, the question is whether those treaty rights and obligations survived the transition of the Kingdom of Serbia into the Kingdom of the Serbs, Croats and Slovenes in 1919.

On this issue, Appellants respectfully submit:

1. That treaty rights and obligations by the generally accepted rules of International Law survive and continue to apply despite changes in forms of government or of territory. That such treaty rights and obligations succeed to so-called successor nations, if the juridical entity of the Contracting Power continues and is reflected in the successor. That such survival is not repugnant to the treaty-making limitations of our Constitution, as it deals only with termination, not creation of treaty obligations and rights.

2. That a juridical continuity exists between the Kingdom of Serbia, as an International Person and the Kingdom of the Serbs, Croats and Slovenes and that the former's treaty rights and obligations toward the United States remained in force and have been applicable to the entire area of the Serb-Croat-Slovene State or later, to the Federal People's Republic of Yugoslavia.

3. That the question whether a treaty, duly ratified by the Senate, is applicable, both as to rights and obligations thereunder, to a foreign country notwithstanding territorial and governmental changes, in its nature political and not judicial and that the courts should accept the conclusions of the Political Department in that regard.

4. That the Executive Branch of the United States Government, namely, the State Department, has by its decision determined that the treaty rights and obligations outlined in the Extradition Treaty with Serbia of 1902 remained in force also after her amalgamation, integration into the Kingdom of the Serbs, Croats and Slovenes in 1918; was in force and effect as to this Kingdom, and is presently in force and effect between the United States and the Federal People's Republic of Yugoslavia.

5. That such decision has been openly evidenced and recognized by the governments of both countries, and is properly in evidence in this instant case.

6. That the decision that the Kingdom of the Serbs, Croats and Slovenes was the juridical successor state to Serbia so that treaty obligations survive, applies to all treaty obligations, not alone to the Extradition Treaty, but to the Commerce and Consular Conventions of 1881, and that there have been numerous, repeated and continuing evidences of, and open recognition of such decision and of governmental and private action pursuant thereto.

Appellee is now released on $5,000.00 bail pending appeal [R. p. 92]. On September 19, 1951, bail was fixed at $50,000.00 [R. p. 289], which continued during the ten months during which the matter was before the District Court. Since the Commissioner has already held

that he does not have jurisdiction to fix bail in a capital case, the reversal of the District Court and discharge of the writ could only lead to another application for bail by way of a new habeas corpus proceeding in the absence of some direction in the mandate. At the original hearing when bail was requested, counsel and the Court all agreed [R. p. 289] that the rule in *Wright v. Henkel,* 190 U. S. 40, 23 S. Ct. 781, 47 L. Ed. 948, was applicable, which, as the Trial Court paraphrased it, was "that ordinarily bail should not be granted in cases of foreign extradition, and that they (the courts) may do so, if at all only in cases where there are special circumstances."

Should the Court of Appeals hold that the Extradition Treaty in question is in force, there is no occasion for delay in proceeding before the Commissioner. We believe the other special circumstances outlined by the Trial Court to be inapplicable.

The attention of the Court is respectfully drawn to the following cases on the question of bail in extradition proceedings:

In re Klein, 46 F. 2d 85:

> ". . . manifestly (in granting bail) they would *incur grave risk of frustrating the efforts of the executive branch of the government to fulfill treaty obligations.*"

United States v. McNamara, 46 F. 2d 84:

> "If the bail, however, be drawn as to cause the money collected on forfeiture to flow to the demanding government, *the situation from an international viewpoint is ridiculous if not insulting.*"

Wright v. Henkel, 190 U. S. 40, 62:

> "The demanding government, when it has done all that the treaty and law requires it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were granted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused would be surrounded with serious embarrassment."

The case of *Wright v. Henkel* did not actually hold that the Court had the power to grant bail in extradition; it merely refused to accede that it did not have the power.

If the matter be considered in the light of the argument under Point III(a) hereof and the language in *Terlinden v. Ames* to the effect that a treaty is executory in nature, a strong case could be made that since the obligation to deliver is that of the Political Department, the release of the prisoner should be only by its consent or under its (the Political Department's) jurisdiction.

Appellants respectfully urge, therefore, that the decision of the District Court should be reversed, the writ of habeas corpus discharged, and that Appellee be remanded to the custody of the United States Marshal to be held pending the conclusion of hearings before the United States Commissioner before whom the extradition complaint is pending.

Respectfully submitted,

Ronald Walker,

Attorney for Appellants.

APPENDIX A.

1901 Extradition Treaty.

Concluded October 25, 1901; ratification advised by Senate January 27, 1902; ratified by President March 7, 1902; ratifications exchanged May 13, 1902; proclaimed May 17, 1902.

ARTICLES.

The United States of America and His Majesty the King of Servia, being desirous to confirm their friendly relations and to promote the cause of Justice, have resolved to conclude a treaty for the extradition of fugitives from justice between the United States of America and the Kingdom of Servia, and have appointed for that purpose the following Plenipotentiaries:

The President of the United States of America, Charles S. Francis, Envoy Extraordinary and Minister Plenipotentiary to His Majesty the King of Servia.

His Majesty the King of Servia, M. Michel V. Vouitch, President of His Council of Ministers, Ministers for Foreign Affairs, Senator, Grand Officer of the Order of Milosh the Great, Grand Cross of the Order of Takovo, Officer of the Order of the White Eagle etc. etc., who, after having communicated to each other their respective

full powers, found in good and due form, have agreed upon and concluded the following articles:

Article I.

The Government of the United States and the Government of Servia mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes and offenses specified in the following article, committed within the jurisdiction of one of the high contracting parties, shall seek an asylum or be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense had been committed there.

Article II.

Extradition shall be granted for the following crimes and offenses:

1. Murder, comprehending assassination, parricide, infanticide, and poisoning; attempt to commit murder; manslaughter, when voluntary.

. . . . . .

Extradition is also to take place for participation in any of the crimes and offenses mentioned in this Treaty, provided such participation may be punished in the United States as felony and in Servia as crime or offense as before specified.

Article III.

Requisitions for the surrender of fugitives from justice shall be made by the Governments of the high con-

tracting parties through their diplomatic agents, or in the absence of such through their respective superior consular officers.

If the person whose extradition is requested shall have been convicted of a crime or offense, a duly authenticated copy of the sentence of the Court in which he has been convicted, or if the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime has been committed, and of the depositions or other evidence upon which such warrant was issued, shall be produced.

The extradition of fugitives under the provisions of this Treaty shall be carried out in the United States and in Servia, respectively, in conformity with the laws regulating extradition for the time being in force in the State on which the demand for surrender is made.

Article IV.

Where the arrest and detention of a fugitive in the United States are desired on telegraphic or other information in advance of the presentation of formal proofs, complaint on oath, as provided by the statutes of the United States, shall be made by an agent of the Government of Servia before a judge or other magistrate authorized to issue warrants of arrest in extradition cases.

In the Kingdom of Servia the diplomatic or consular officer of the United States shall apply to the Foreign Office, which will immediately cause the necessary steps to be taken in order to secure the provisional arrest and detention of the fugitive.

The provisional detention of a fugitive shall cease and the prisoner be released if a formal requisition for his

surrender, accompanied by the necessary evidence of criminality, has not been produced under the stipulations of this Treaty, within two months from the date of his provisional arrest and detention.

Article V.

Neither of the high contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Treaty.

Article VI.

A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished, for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the Government on which the demand for surrender is made, or which may have granted the extradition, shall be final.

Article VII.

Extradition shall not be granted, in pursuance of the provisions of this Treaty, if legal proceedings or the enforcement of the penalty for the act committed by the person claimed has become barred by limitation, according to the laws of the country to which the requisition is addressed.

Article VIII.

No person surrendered by either of the high contracting parties to the other shall, without his consent, freely granted and publicly declared by him, be triable or tried or be punished for any crime or offense committed prior to his extradition, other than that for which he was delivered up, until he shall have had an opportunity of returning to the country from which he was surrendered.

Article IX.

All articles seized which are in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offense charged, or being material as evidence in making proof of the crime or offense, shall, so far as practicable and in conformity with the laws of the respective countries, be given up to the Country making the demand, when the extradition takes place. Nevertheless, the rights of third parties with regard to such articles shall be duly respected.

Article X.

If the individual claimed by one of the high contracting parties, in pursuance of the present Treaty, shall also be claimed by one or several other powers on account of crimes or offenses committed within their respective jurisdictions, his extradition shall be granted to the State whose demand is first received: Provided, that the Government from which extradition is sought is not bound by treaty to give preference otherwise.

Article XI.

The expenses incurred in the arrest, detention, examination, and delivery of fugitives under this Treaty shall be borne by the State in whose name the extradi-

tion is sought; Provided, that the demanding Government shall not be compelled to bear any expense for the services of such public officers of the Government from which extradition is sought as receive a fixed salary; and, provided, that the charge for the services of such public officers as receive only fees or perquisites shall not exceed their customary fees for the acts or services performed by them had such acts or services been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

The present Treaty shall take effect on the thirtieth day after the date of the exchange of ratifications and shall not act retroactively.

The ratifications of the present Treaty shall be exchanged at Belgrade as soon as possible, and it shall remain in force for a period of six months after either of the contracting Governments shall have given notice of a purpose to terminate it.

In Witness Whereof, the respective Plenipotentiaries have signed this Treaty in duplicate and have hereunto affixed their seals.

Done at Belgrade this twenty-fifth (twelfth) day of October in the year of our Lord one thousand nine hundred and one.

Charles S. Francis (Seal)
Dr. Michel Vouitch (Seal)